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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-2021

MICHAEL WILLIAM STRAND, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

UNITED STATES OF AMERICA, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Michael William Strand, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on the 19th of March, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Utah.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 19, 1980. An extension of time was granted for the filing of the petition for a Writ of Certiorari until June 21, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM WHERE ONE DISTRICT JUDGE RULED BEFORE TRIAL AS TO THE PROSECUTION'S OBLIGATIONS TO PROVE THE SUBSTANCE OF AN OFFENSE CHARGED AGAINST THE PETITIONER AND THEREAFTER A SECOND DISTRICT JUDGE AFTER PRESENTATION OF THE EVIDENCE CHANGED THE RULING OF THE FIRST JUDGE SUBSTANTIALLY CHANGING THE NATURE OF THE PROSECUTION'S BURDEN.

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STATUTORY PROVISIONS INVOLVED

United States Code Title 26:

§ 7206(1) Any person who —

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony . . . .

United States Code Title 15:

§ 77q(a)

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

STATEMENT OF THE CASE

The petitioner, Michael William Strand, was indicted by a grand jury in the United States District Court for the District of Utah on July 12, 1978. The indictment charged three counts. Count I alleged a violation of 26 U.S.C. § 7206(1) for subscribing a false tax return. It was alleged that for the calendar year 1973 petitioner made an income tax return which he did not believe to be true and correct as to every material matter in that the return reported no gross income or gross receipts when petitioner had "substantial gross receipts." Count II charged a violation of the Securities Act of 1933, 15 U.S.C. §§77q(a) and 77x. Count II alleged that from May 2, 1973 continuing to on or about October, 1973, the petitioner employed a device, scheme and artifice to defraud and did obtain money and property by means of untrue statements of material facts and omissions and did engage in transactions, practices and a course of business that operated as a fraud and deceit upon purchasers of securities. Six paragraphs of allegations of fact were alleged in support of the charge. Count II charged a violation of 18 U.S.C. § 2314, interstate transportation of stolen property. Count III was dismissed at the end of the prosecution's case at trial. The petitioner was convicted on jury trial of Counts I and II.

On Count II of the indictment, charging a securities violation, the petitioner filed a pre-trial motion in the court to dismiss the Count or to require the prosecution to sever or elect on the grounds that the charge alleged a violation of two or more offenses in the same Count and was, therefore, duplicitous. The motion was heard before the Honorable

Aldon J. Anderson, Chief Judge of the District of Utah, on September 22, 1978. As to Count II, counsel for petitioner expressly stated he did not really know what defendant was charged with:

> "Your Honor, I submit I cannot defend this case unless I know what my client is charged with doing." (Proceedings, Sept. 22, 1978, p.6).

It was contended that the indictment was duplicitous as it was framed because petitioner was charged with three separate courses of action in violation of each of the clauses of the statute. The Court then addressed the prosecutor and asked if that did not mean that the prosecution would have to prove each allegation to make out its charge and the prosecution indicated acceptance of that position:

> "THE COURT: Well, if they are all interrelated then you are saying you have to prove them all.
>
> MR. SNARR: *I am happy and comfortable with that, Your Honor.* I am not sure I am willing to say at this point if I missed one I would not have proved the total scheme to the satisfaction of the jury. We think they are all part of the scheme and we had to charge them all and we would be attempting to prove them all in support of the one charge and that's the scheme to defraud.
>
> THE COURT: Well, the one charge, scheme to defraud in the sale of stock, that's the one little hangup. These are separate transactions, Mr. Leedy says. You say that are interrelated, that the scheme contemplated all of these transactions would flow from the scheme.
>
> MR. SNARR: That's my position, Your Honor."
>
> (Proceedings, Sept. 22, 1978, p.22) (Emphasis added).

The Court then entered its order to govern the prosecution's burden of proof:

> "The Court will rule that the motion is denied. The Government is charged with proving all of those things and it is the sales as contemplated under the statute." (Proceedings, Sept. 22, 1978, p. 23).

The case was subsequently tried before the Honorable H. Vearle Payne, Judge from the District of New Mexico sitting in the District of Utah. At the end of the presentation of evidence and after the parties had rested, Judge Payne overruled Judge Anderson's previous order. Judge Payne took the position that he considered Judge Anderson's ruling wrong and that the prosecution could sustain a conviction without having to prove each of the allegations in the indictment. He stated:

> "THE COURT: Well, if I had made a ruling, I would have reversed myself. If that's what he's ruled, that you have to prove every one of them, because that's not the law. The law is that they must prove one or more. And that's the way I'm going to rule. So the motion will be denied."

The trial judge then instructed the jury contrary to Judge Anderson's initial ruling that the prosecution could sustain a conviction on count II by proving one or more of the methods of violation alleged in Count II under 15 U.S.C. § 77q(a). The effect of the ruling of Judge Payne was to allow the prosecution to change its theory of the case after the evidence had been closed. As the dissenting judge in the Court of Appeals (Judge McKay) stated: "[T]his decision permits the government to inform the accused of the 'nature and cause of the accusation' after the completion of the trial."

On Count I of the indictment charging the subscribing of false tax return, 26 U.S.C. § 7206(1), the Government requested an instruction be given to the jury as to the issue of materiality

of the alleged falsity of the return (Tr. Vol. 5, 846, Government Request No. 8). The petitioner also contended that the question was one to be "determined by the jury" (Tr. Vol. 5, 846). The trial judge disagreed with both parties and, over petitioner's exception, instructed the jury that the question of materiality was a question of law for the court. The trial judge instructed the jury that certain facts were material (Tr. Vol. 5, 921), thus removing from the jury's consideration any issue of fact as to the materiality of the alleged false statements in the petitioner's tax return.

The petitioner filed several motions for discovery and the United States Attorney for the District of Utah allowed an open file policy. The indictment was returned on July 12, 1978 and the illegal sales referred to in Count II allegedly occurred on or about July 18, 1973. It was obvious that at the time of the indictment the Government was acting under a possible threat from the statute of limitations as to Count II. Counsel for petitioner filed a pre-trial motion to dismiss for prejudicial pre-trial delay. An affidavit in support of the motion contained information discovered from the Government's files indicating that in May or June of 1975, a form indictment on the substance of Count II had been prepared and the United States Attorney was ready to proceed. This was acknowledged by Government counsel in argument before the Court of Appeals. The Government delayed the indictment on Count II to the last possible moment in order to join it with the tax count which was still under investigation. Since the issues in the tax count were distinct from those in the securities count, the only reason for the delay was to enable the Government to introduce into evidence matters relating to the tax issues as they might bear upon the jury's assessment of the securities count and vice versa. Thus, the delay was to gain prosecutorial

advantage. Because of the delay, the defense was deprived of records and witnesses relevant to issues at trial. Critical records in the hands of third parties were stolen and witnesses not available. These facts as to the defendant's prejudice was not denied or refuted by the Government.

During the course of the trial, the defendant-petitioner took the witness stand. On cross-examination, the Government prosecutor attempted to impeach the defendant-petitioner based upon prior recorded statements in the form of three depositions taken by the Securities and Exchange Commission. None of these depositions were produced by the government, although the defendant-petitioner made a timely motion for production pursuant to the Federal Rules of Civil Procedure.

During the closing argument the prosecution indicated that although the government had produced ample evidence of the defendant-petitioner's failure to report substantial income, there was additional evidence which it could have produced had it chose to do so.

REASONS FOR GRANTING THE WRIT

Issue One: The decision below fails to honor the petitioner's Fifth Amendment rights to due process of law and Sixth Amendment right to be informed of the nature and the cause of the accusations against him.

The facts as to what occurred in the trial court are not actually in dispute concerning the nature of the accusation against the petitioner. Petitioner moved to dismiss Count II of the indictment arguing that it was duplicitous in charging several transactions in one count. The Court of Appeals noted that Chief Judge Anderson entered his order in response to the petitioner's motion and the prosecution's statement that it could "live" with a requirement that it prove each of the

several allegations contained in Count II of the indictment. Judge Anderson expressly indicated that the Government was charged with proving all of the things alleged under the indictment. Judge Payne clearly indicated that he felt Judge Anderson's ruling was wrong and changed the prosecution's burden at the end of the trial. Petitioner contended before the Court of Appeals in his Brief on Appeal and Supplementary Brief that the conduct of the trial judge denied him his Fifth Amendment right to due process of law and his Sixth Amendment right to notice of accusation because not until the end of the presentation of the evidence was he ever aware of the Government's burden on Count II of the indictment. Judge McKay, in dissenting in the Court of Appeals, stated that Judge Anderson "imposed on the Government the obligation to prove the six alleged events and transactions set out in Count II." Judge Payne departed from that order in such a fashion that Judge McKay, in his dissenting opinion in the Court of Appeals, remarked, "I cannot imagine a more sharply defined reversal of legal theories." The majority of the Court of Appeals said that there was no prejudice in the rulings. However, it should be obvious that the petitioner was never certain of what the prosecution had to prove until after the case was concluded. The petitioner would undoubtedly be under the assumption that the Government had the burden of proving all of the allegations in the indictment. If the Government did not present evidence on one of the alleged transactions there was no need to refute other affirmative evidence pertaining to Count II, since the prosecution could not sustain a conviction unless all of the allegations were established. By changing the rules after the game the defendant in a criminal case is deprived of an opportunity to

prepare a defense or to counter evidence which, at the time it was presented, did not seem compelling or critical. Judge McKay's dissent concluded that the majority opinion in the Court of Appeals "undermined a fundamental tenet of jurisprudence that the accused be informed of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution." In *Russell v. United States*, 369 U.S. 749, 764 (1962), this Court noted that an indictment should be framed so that the Sixth Amendment mandate that a defendant be informed of the nature and the cause of the accusation against him is followed. This obligation has been recognized as a fundamental part of due process of law. *In re Oliver*, 333 U.S. 257, 273 (1948); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Rabe v. Washington*, 405 U.S. 313 (1972). An accused must be apprised of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge. *United States v. Cruickshank*, 92 U.S. 557 (1876); *Hendricks v. United States*, 233 U.S. 178 (1912). The Sixth Amendment has been held to require that a charge set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged." *United States v. Cook*, 7 Wall., U.S., 168, 174 (1872). In the instant case, the Sixth Amendment right to be informed of the nature and the cause of the accusation was violated not so much because of the deficiency of the indictment but most importantly because of the differing orders of interpretation of the Government's obligation and burden on Count II of the indictment. This Court has not addressed the question as to whether such actions of a trial court, as were taken in the context of this case, can so mislead and confuse a defendant as to violate the Sixth Amendment or violate due process. This

Court should assume jurisdiction to rectify the denial of fundamental fairness that deprived the accused of not only his rights under the Sixth Amendment but his rights to due process of law as well. *Palko v. Connecticut*, 302 U.S. 319 (1937); *Vitek v. Jones*, _____ U.S. _____, 100 S.Ct. 1254 (1980).

Issue Two: The decision below treating materiality as an issue of law conflicts with decisions of other Courts of Appeals and denied the petitioner his right to a jury trial under Article III, Section 2, clause 3 and the Sixth Amendment to the Constitution of the United States.

The petitioner contended that the trial court should not have ruled that the issue of materiality under 26 U.S.C. § 7206(1) was an issue of law for the court. Petitioner contended that such action violated Article III of the Constitution of the United States requiring that in federal prosecutions "the *trial* of all crimes * * * shall be by jury" and the Sixth Amendment right to trial by an impartial jury. As the Court of Appeals noted in its opinion "there is a diversity of authority on whether the issue of materiality under § 7206(1) is properly one of law for the court." Further, as the D.C. Circuit has noted in *United States v. Hayward*, 420 F.2d 142 (D.C. Cir. 1969) the right to a trial by jury "is the right to have the jury decide all relevant issues of fact and to weigh the credibility of witnesses." 420 F.2d 144. Further, in *Sinclair v. United States*, 279 U.S. 263 (1929) at p. 298, this Court noted that pertinency in a contempt of Congress case was an issue of law where "[it] did not depend on the probative value of evidence." The concept of trial by jury in a criminal case subsequent to the time of the *Sinclair* case has so crystallized as to clearly require the prosecution, as a matter of consitutional obligation, to establish the guilt of the accused beyond a reasonable doubt as to every fact necessary to constitute the crime charged.

In re Winship, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The particular facts of this case would not seem to conform to the implications of the *Sinclair* decision, since the question of whether the statement in the petitioner's tax return was material would depend upon the facts of his particular tax situation. Further, the Ninth Circuit Court of Appeals has recently indicated in a prosecution under 18 U.S.C. § 1001 that the issue of materiality under that statute is one to be submitted to the jury for resolution. *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979). In this particular case materiality could very well have been a fact in dispute. The petitioner was a trader in the over-the-counter market. He had entered into a series of wash or match trades. These were trades in which the petitioner sold a stock at one brokerage firm and purchased the same stock at another brokerage firm. Thus, there was no beneficial change in ownership. However, the Government argued that each sale constituted gross receipts which should have been reported on petitioner's tax return. However, petitioner argued that such was immaterial inasmuch as there was no income from the sale. It is submitted, therefore, that this Court should assume jurisdiction of this matter to resolve the conflict between the Circuits and to further clarify the right of the accused to have the jury determine all facts at issue at trial including the question of materiality of an alleged false statement in a tax return.

Issue Three: The decision below conflicts with prior precedent from this Court to the effect that pre-indictment delay may violate an accused's right to due process of law.

Prior decisions of this Court have asserted that in some instances an accused in a criminal case may have a valid claim of a denial of due process of law due to pre-indictment

delay, *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Lovasco*, 431 U.S. 783 (1977). Two elements of a due process claim have been considered critical by this Court. First, that the pre-indictment delay by the Government be intentional to gain an advantage over the defendant. Second, that actual prejudice result to the defendant from the delay. In the instant case both of these requirements are present and satisfied. The Government had fully investigated and prepared an indictment for Count II at least three years prior to the time the indictment was actually returned. Prior to presenting the matter to the grand jury, the prosecution checked with other government agencies and discovered that petitioner was undergoing an investigation by the Internal Revenue Service. The government intentionally delayed the presentment of the indictment on the securities violation until the Internal Revenue Service had completed their investigation. The prosecutor, in his argument before the Court of Appeals indicated that the reason for so doing was that the Internal Revenue Service refused to investigate charges for prosecution if the target of their investigation was under an indictment or crime arising out of the same facts. Thus, the prosecutor chose to delay presentation of the indictment to the Grand Jury until the Internal Revenue Service had decided whether or not their case was sufficient for criminal charges. The Internal Revenue Service investigation was not completed until three years after the securities case was ready for presentation to the Grand Jury. The Government stated that the delay was, in actuality, to help the defendant so that he would not be required to face two separate charges at two separate times (although the prosecutor did state the Internal Revenue Service would refuse to prepare a criminal case if the target had been

indicted for the same conduct on another charge). Mr. Justice McKay, of the Tenth Circuit Court of Appeals countered to the prosecutor that it appeared to him that the Government wished to lump as many charges as it could in one indictment and make the defendant appear to be a bad man. The defendant believes that the delay was to gain the advantage of a whipsaw or symbiotic prosecution on the two counts because of the broad joinder allowances of Rule 8, Federal Rules of Criminal Procedure. These series of match trades or wash transactions engaged in by the defendant were relevant to the tax charges. However, the securities portion of the indictment only charged three transactions and, therefore, the entire series of wash trades would no be relevant to the stock fraud charge, but such evidence could obviously influence the jury as to the defendant's machinations in the stock market. The delay in this case enabled the prosecution to obtain an advantage at trial. The prosecution was so concerned about such an advantage that when the statute of limitation was approaching in Count II, it rushed to indict on Count I without the usual taxpayer conferences that precede federal tax prosecutions. The statute of limitations on Count II of the indictment would have run five days after the indictment was reached. The indictment was returned four years, three hundred and sixty days after the alleged transaction. The prosecution did not dispute that, as a result of the delay, records in the hands of third persons and companies (Continental Securities Corporation), relevant to the petitioner's defense, were stolen or destroyed and witnesses, having information that would have been useful to the petitioner, were no longer available. The delay was prejudicial to the petitioner's case on Count II. None of the delay was

attributable to the petitioner. Evidence on Count II had been given at administrative proceedings before the Securities Exchange Commission as early as July, 1974. Although fully one half of the oral argument and questioning by Mr. Justice McKay of the prosecution concerned the issue of pre-indictment delay, the opinion of the Tenth Circuit Court of Appeals did not even mention this issue. Consequently, the actions of the trial court and Court of Appeals ignoring this issue are violative of prior decisions of this Court. Although this Court has never expressly reversed a conviction for pre-indictment delay, this case affords an opportunity not only to rectify an injustice, but to further clarify the standards addressed in *United States v. Marion* and *United States v. Lovasco, supra.*

Issue Four: This Court has never ruled on the sanctions to be applied for the Government's failure to produce statements pursuant to Rule 16(a)(1)(A). That rule requires the Government to produce "any written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the Government . . ." The defendant's motion requested the Government to produce "any written or recorded statement of the defendant, Michael William Strand, which is in the possession of the government or which is otherwise available to the government . . . (R-12)".

The Government responded indicating a willingness to comply with the provisions of the Rule and in open court expressed a willingness to follow an "open file policy". At no time were any written or recorded statements of the defendant produced. During the trial, the petitioner took the witness stand and on cross-examination the prosecutor referred to a deposition given by Strand before the Securities and Exchange Commission. When counsel objected stating that

he had never been shown the depositions, the prosecutor did not pursue impeachment or cross-examination of Strand with the depositions. It became apparant that the petitioner had not given just one deposition before the Securities and Exchange Commission, but three. None of these were produced. This was discovered during a bench conference after the objection. Following the jury verdict, appellant made a motion for a new trial based in part, upon the failure of the government to comply with the provisions of Rule 16(a)(1)(A) (R-235). The trial court denied the motion without ever requiring production of the deposition or examining the deposition to determine its relevance or potential prejudice.

This matter was raised on appeals before the Tenth Circuit Court of Appeals. Not only did the petitioner seek reversal, but at least, sought to have the appellate court allow an examination of the depositions to determine whether or not the failure to produce was prejudicial. Again, the Tenth Circuit Court of Appeals did not opine regarding this issue.

As pointed out before, the indictment was returned almost five years after the alleged transactions. The deposition testimony was not something that counsel was aware of or otherwise had access to. It was apparently given before the Securities and Exchange Commission several years prior to the trial. By the government's initiation of cross-examination and impeachment based upon the deposition and then the cessation of such examination upon objection and ruling by the trial court the jury was left with the obvious impression that the testimony of the appellant was inconsistent with some testimony given before the SEC, but the substance of the inconsistency and the dimensions were never disclosed. Indeed, whether there was such an inconsistency still cannot

be determined, since the government has still failed to produce the depositions. It is submitted that under such circumstances, prejudicial error has been committed which warrants the granting of a new trial. Rule 16(d) F.R.Cr.P. provides that on the failure of a party to comply with a discovery provision of Rule 16, the Court may take remedial action. The defendant submits that in this case the Court should have granted a new trial. Rule 16(a)(1)(A), F.R.Cr.P. provides for an unqualified right of production of all written or recorded statements or confessions made by the defendant. *United States v. Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974). In *United States v. Countryside Farms, Inc.*, 428 F. Supp. 1150 (D.C. Utah 1977), the Court interpreted Rule 16 in general as requiring an opportunity to: "Inspect and copy all documentary evidence under the control of the government * * *" It is apparent that in this case there was a failure to comply with Rule 16.

The failure to make discovery has normally been before the Tenth Circuit Court of Appeals in conjunction with the issues of admissibility of evidence and potential prejudice to the defendant. *United States v. Hodges*, 480 F.2d 229 (10th Cir. 1973); *United States v. Dowdy*, 455 F.2d 1253 (10th Cir. 1972); *United States v. Smith*, 496 F.2d 185 (10th Cir. 1974); *Nolan v. United States*, 423 F.2d 1031 (10th Cir. 1969). In those cases, the Court has either found that the government did, in fact, comply with Rule 16 or other production requirements, *Nolan v. United States, supra*, or that when examining the evidence found that it was cumulative or insignificant and that therefore, the failure to make discovery was not prejudicial. *United States v. Hodges, supra; United States v. Dowdy, supra.* In *Hodges*, the Court acknowledged

that recorded conversations of the defendant are discoverable "as a matter of right" on pre-trial discovery motion. There is no discretion in the trial court. Even so, the *Hodges* case stands for a proposition that if it is demonstrated that no prejudice occurred there is no basis for reversal. However, in the instant case, it cannot be said that there wasn't prejudice. There is simply a failure to comply with Rule 16. If the statement of the appellant given before the S.E.C. was in fact consistent with his testimony or consistent with other testimony that had been assailed, that evidence would have been admissible as substantive evidence. Rule 801(d)(1)(B), Federal Rules of Evidence, 28 U.S.C.. As such, it may have been useful to the defense. Furthermore, because of the passage of time the petitioner's memory concerning the events was dimmed. He could not recall what happened with all of the proceeds from the securities transactions alleged in Count II. The depositions may have revealed these facts.

Most recently, in *United States v. Bowers*, 593 F.2d 376 (10th Cir. 1979), the Tenth Circuit Court of Appeals had occasion to consider the Government's failure to comply with production requirements not disclosed as required by Rule 16 F.R.Cr.P. The Court speaking of the trial court's decision to allow introduction of evidence not produced when it should have found no prejudice. In the instant case, since the nature of the deposition is unknown and in fact, has never been produced, there is no way of demonstrating prejudice or lack thereof. It would be incongruous to suggest that the Government can refuse to comply with a rule mandating discovery, fail to disclose the significance of the evidence not produced, and then contend that in the absence of demonstrated prejudice, reversal is not proper. Such action

would allow the Government to bootstrap its wrongdoing into a shield for protecting itself from a legitimate claim of error.

The defendant was never given the deposition evidence within sufficient time to determine whether it may have been exculpatory usable to contradict Government witnesses, substantive evidence, or to place evidence in a proper context. The Government has a duty to turn over exculpatory evidence and it is a continuing one, *United States v. Coppola*, 526 F.2d 764 (10th Cir. 1975); *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969). If the government acts wrongfully, the Court may impose appropriate sanctions, including dismissal of the charges or a mistrial, *United States v. Leta*, 60 FRD 127 (D.C. Pa 1973). In appropriate cases a new trial is proper, *United States v. Rivera*, 513 F.2d 519 (2nd Cir. 1975); *United States v. Padrone*, 406 F.2d 560 (2nd Cir. 1969). This Court should grant a definitive ruling concerning the sanctions to be applied for a violation of the discovery rules by the Government and order that the petitioner is entitled to a new trial.

Issue Five: Prejudicial error occurred during the prosecutor's closing argument to the jury when he referred to an invited the jury to speculate as to matters not in evidence.

During the closing argument of the prosecution the following argument was made to the jury (Tr. Vol. V., p. 816):

> "Ladies and gentlemen, at this point it's difficult to determine the exact tax liability of Mr. Strand because these transactions were not reported to the Internal Revenue Service. We have attempted to show you the trading activity of Mr. Strand in various accounts. Some of these we have admitted into evidence. But, in addition to the ones we have admitted in evidence, you have heard testimony on various occasions, J.C. O'Quinn acted as Mike's nominee; Gary Ramsey acted as Mike's nominee.

> We have not provided that information to try to assess tax.
>
> "Norma Ramsey acted as a nominee. Nancy Peterson acted as a nominee. Lois Linford at Olsen and Company, we have not brought her account into this trial, and other nominees, perhaps Mr. Katter, of Mr. Strand.
>
> "Now all these nominees, have we really had a disclosure of the sales transactions, or even the basis so that a proper tax could be computed?
>
> "We submit not."

Appellant made a motion for a new trial based upon the above statement (R. 235). The trial court rejected the motion (R. 253). It is submitted such action was in error and that the prosecutor's statement was prejudicial and justification for reversal and a new trial.

The statement of the prosecution was declared to the jury that other evidence existed, other than that presented, that would support the prosecution's case. The statement invited the jury to speculate about such evidence and use their speculations as evidence of appellant's guilt. It is prejudicial misconduct for a prosecutor to bring to the jury's attention matters not properly introduced in evidence. See, 90 ALR 3d 646, 652.

Counsel may not in closing argument, testify as to matters not in evidence, Abbott, *Criminal Trial Practice*, § 652.

In Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 Journal of Criminal Law and Criminology 22, 28 (1973), it is observed:

> "Conversely it follows from the general rule that the prosecutor's remarks are improper if not based directly on the evidence, if not reasonably inferred from the evidence, or if they relate to matters outside the issues

> in the cases. Such comments are speculation and conjecture which may confuse and mislead the jury. Furthermore, argument going beyond the evidence tends to make the prosecutor a witness. His unsworn testimony and personal beliefs, although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence. "For these same reasons it is improper to refer to specific evidence which was never introduced or to the existence of other evidence not in the record."

The implication or assertion of evidence outside the record is error. *United States v. American Radiator & Standard Sanitation Corp.*, 433 F.2d 174 (3rd Cir. 1970). Further, reference to evidence not in the record is error of such severity that the failure to object does not waive or excuse the impropriety. *Garris v. United States*, 390 F.2d 862 (D.C. Cir. 1968); *King v. United States*, 372 F.2d 383, 395 (D.C. Cir. 1967). Where a United States attorney, in argument, stated that fifty witnesses were available to rebut the defendant's character witnesses, the Court found reversible error even though there was no objection, *Ginsberg v. United States*, 257 F.2d 950, 954 (5th Cir. 1958). The argument of a government prosecutor introducing before the jury matters not in evidence was the basis for reversal in *United States v. Latimer*, 511 F.2d 498 (10th Cir. 1975).

Recently, in *United States v. LaBarbera*, 581 F.2d 107 (5th Cir. 1978), in reversing a conviction, the Court stated:

> "Several of the prosecutor's comments made during the trial and closing argument, whether intentional or inadvertant, could easily be construed as indicating that the prosecutor knew that defendant was involved in other criminal misconduct and that the prosecutor had

> knowledge of evidence not before the jury which showed defendant's guilt of the present crime. The cases consistently hold that such comments deprive a defendant of a fair trial."

The prosecutor in the instant case made reference to additional evidence that had not been presented to the jury and invited the jury to speculate that the prosecution's case was based on more evidence than that actually presented. Such action in this case was prejudicial and warrants reversal.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement of the Tenth Circuit Court of Appeals.

Respectfully submitted,

RICHARD J. LEEDY
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Counsel for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL WILLIAM STRAND,
Defendant-Appellant.

No. 79-1155

Appeal from the United States District Court
For the District of Utah
(D.C. Cr. No. 78-000091)

Steven W. Snarr, *Assistant United States Attorney*
(Ronald L. Rencher,
United States Attorney, with him on the brief),
Salt Lake City, Utah, for Plaintiff-Appellee.

Richard J. Leedy,
Salt Lake City, Utah,
for Defendant-Appellant.

Before McWILLIAMS, BARRETT and McKAY,
Circuit Judges.

BARRETT, *Circuit Judge*

Michael William Strand (Strand) appeals his jury conviction of subscribing a false income tax return in violation of 25 USCA § 7206(1) and fraud in the sale of securities in violation of the Securites Act of 1933, 15 U.S.C.A. § 77q(a) and 77x. A third charge for interstate transportation of stolen property was dismissed upon Strand's motion at the conclusion of the Government's case.

The alleged violations occurred during 1973. Strand was then involved in numerous selling and purchasing stock transactions of Epoch Corporation (Epoch), being traded on the over-the-counter exchange. Strand effectuated these transactions through his own accounts and through various nominee accounts[1] at different brokerage houses. By utilizing both his own and various nominee accounts, Strand was able to control the purchase and sale "prices" of Epoch stock and create the appearance of an active market for its securities. In summarizing these transactions, Special Agent David Jensen of the Internal Revenue Service estimated Strand's Epoch transactions produced gross receipts of $293,793.37. The Government also established that during this same time frame, Strand was involved in preparations for two mergers for which he received finder's fees of $29,000.00.

Exhibit 27, admitted as a certified copy of Strand's income tax return for 1973, showed zero tax computations and income. It did not contain references to the gross receipts relating to Strand's sale of stocks or the aforesaid finder's fees.

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[1]A nominee account is one in which the account is listed in the name of an individual, when in fact the transactions within the account are for someone other than the named individual.

Strand defended the charge that he had subscribed a false income tax return in violation of § 7206(1) on the basis that he had actually suffered a loss of $7,000 in 1973 on the Epoch transactions; that he did not realize he had any tax reporting obligation until after 1973 when he "heard" that even though he did not have income he was obliged to file; and that, accordingly, in January, 1975, he filed a 1973 return.

Strand defended the fraud in the sale of securities charge on the basis that: he took over trading in Epoch corporation when he thought its proposed merger with an insurance company would cause its stock to increase in value; the sales of Epoch stock, giving rise to the charges, was initiated by one Bruce Allen Jensen (Jensen); Jensen managed the entire transaction and was the principal actor throughout the whole transaction; he (Strand) was not aware that his account had been improperly used by Jensen; and when, as here, the alleged defrauded party, Jensen, was a principal in the transaction and wholly aware of the nature of the fraud, there was no fraud on that person simply because the transaction did not prove to be as beneficial as expected.

Following the jury verdicts of guilty on the charges of subscribing a false tax return (Count I) and fraud in the sale of securities, (Count II), Strand was sentenced to three years on Count I, and five years on Count II, with all but six months suspended. Strand was ordered to serve the six months in a "jail type" facility. He was placed on probation for the balance of the sentence.

On appeal, Strand contends the trial court erred, *inter alia*, in: (1) instructing the jury on materiality in Count I; (2) not granting his motion to sever the Counts; (3) allowing specific evidence "of the general bad character of the appellant"; (4) imposing a different burden of proof on Count II

in contradiction to another district judge's previous ruling; (5) not correcting the prejudicial error committed by the prosecutor's failure to produce evidence properly discoverable under Rule 16(a)(1)(A); and (6) refusing to dismiss Count II because of prejudicial pretrial delay.

I.

Strand contends the Court erred in instructing the jury on the materiality issue found in Count I of the indictment and in treating the issue as one of law. Strand argues that in so instructing, the Court effectively denied him his right to trial by jury.

Count I charged Strand with subscribing a false tax return in violation of § 7206(1). Section 7206(1) provides in part:

> Any person who -
>
> 1) Willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true as to every material matter . . .
>
> * * *
>
> shall be guilty of a felony . . .

In instructing on Count I the Court stated:

> The question of materiality of the allegedly false statements made in connection with the subscribing of a tax return is a question of law for the Court. The Court instructs you that if you find that a substantial amount of gross receipts or other income was omitted from the tax return at issue herein, such omission is of a material matter as contemplated by Section 7206, Subsection 1, of Title 26 of the United States Code.
> [R., Supp. Vol. VI at p. 921].

Section 7206(1) is a felony statute, which "is violated when one '[w]illfully makes and subscribes any return', under penalties of perjury, 'which he does not believe to be true and correct as to every material matter.' ". *United States v. Bishop*, 412 U.S. 346 (1973) at p. 350.

While acknowledging that there is a diversity of authority on whether the issue of materiality under §7206(1) is properly one of law for the court, Strand contends that the correct rule is set forth in *United States v. Null*, 415 F.2d 1178 (4th Cir. 1969) wherein the Court stated that the test of materiality was:

> . . . whether a particular item must be reported "in order that the taxpayer estimate and compute his tax correctly" . . . *This* issue was properly submitted to the jury.
> 415 F.2d at p. 1181.

This Court has not heretofore ruled on whether the issue of materiality under § 7206(1) is properly one of fact for the jury or one of law for the court. We hold that it is one of law for the court. We agree with this rationale contained in *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978):

> This appeal raises squarely the question of whether a taxpayer's failure to report substantial amounts of gross livestock receipts on Schedule F renders the return materially false. We hold that it does.
>
> The trial judge did not err in deciding the question of materiality as a matter of law rather than submitting it to the jury. We have long held that in a prosecution for perjury the materiality of the alleged false statement is a question of law. *Blackmon v. United States*, 108 F.2d 572, 574 (5th Cir. 1940). The rule applies to prosecutions under section 7206(1). *Hoover v. United States*, 358 F.2d 87 (5th Cir. 1966), *cert. denied* 385 U.S. 822, 87 S. Ct. 50,

17 L.Ed.2d 59 (1966); *accord, United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975).

The Court, in *Taylor, supra*, further noted:

> Other courts of appeals have considered directly whether omission of gross receipts is a material falsehood. In *Siravo v. United States*, 377 F.2d 469 (1st Cir. 1967), the court affirmed a conviction under section 7206(1), holding that gross receipts from the taxpayer's business were "material items necessary to the computation of income." *Id.* at 472. In striking similarity to Taylor, Siravo received wages, which he reported,[8] and also operated a jewelry assembling business. He made no entry on his Form 1040 opposite the heading "profit (or loss) from business," nor did he file a separate Schedule C. The government proved that he had received gross receipts ranging from $22,242 to $54,319 for the three years in question.
>
> 574 F.2d at p. 236. [Footnote omitted].

This view was also adopted in *United States v. Warden*, 545 F.2d 32 (7th Cir. 1976). The Court there stated:

> The test of materiality with respect to a false return case "is whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly.' " *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). Since deductions are subtracted from fross income or adjusted gross income to reduce the ultimate tax liability, they are material to the contents of the return. Stated otherwise, the deduction will invariably affect the taxpayer's liability. Thus, when Judge McLaren instructed the jury that the deductions were material matters as that term is used in the indictment, he did no more than state the obvious fact that deductions affect the computation of tax liability.
>
> 545 F.2d at p.37

In adopting this rule, we do not, as well stated in *United States v. Haynes*, 573 F.2d 236 (5th Cir. 1978), *cert. denied*, 439 U.S. 850 (1978), interfere with the jury's obligation of deciding the ultimate issue of whether the returns were willfully falsified:

> Accordingly, we hold that the materiality question under § 7206(2) should be treated no differently than the same issue under § 7206(1) and other federal perjury statutes. This is, materiality is a question of law to be decided by the court. We point out that the jury still must decide the ultimate issue of whether the returns had been willfully falsified, and this issue is generally the focal point of § 7206 cases. *See United States v. Pomponio*, 429 U.S. 10, 97 S. Ct. 22, 50 L.Ed.2d 12 (1976); *United States v. Bishop*, 412 U.S. 346, 93 S. Ct. 2008, 36 L.Ed.2d 941 (1973); *United States v. Brown*, *supra*. In the instant case, the jury had to find that Haynes had willfully inflated legitimate deductions or manufactured non-existent deductions in order to find him guilty. *See United States v. Warden*, 545 F.2d 32 (7th Cir. 1976). Thus, the trial judge in the instant case correctly concluded that the materiality question was one of law for the court to decide.
>
> 573 F.2d at pp. 240-241.

II.

Strand argues that the Court erred in not granting his motion to sever Count I, (subscribing a false tax return) from the counts of fraud in the securities transactions and interstate transportation of stolen property. (As noted, *supra*, Count III, charging Strand with interstate transportation of stolen property was dismissed by the Court at the end of the Government's case.)

Strand contends that the joinder of Counts I and II was improper under the Fed. Rules Cr. Proc. rule 8(a), 18 U.S.C.A., which provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Strand further argues that even if Counts I and II were properly joined under Rule 8(a), the Court abused its discretion in failing to grant his motion to sever and elect under Fed. Rules Cr. Proc. rule 14, 18 U.S.C.A. Rule 14 provides in part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

The decision to grant a severance is within the sound discretion of the trial court and its decision will not ordinarily be reversed in the absence of a strong showing of prejudice. *United States v. Heath*, 580 F.2d 1011 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979). A trial court may grant a severance if it appears that the defendant or Government is prejudiced by joinder. *United States v. Herring*, 582 F.2d 535 (10th Cir. 1978). In order to obtain a severance, a defendant must show clear prejudice resulting from joinder at trial. *United States v. Bridwell*, 583 F.2d 1135 (10th Cir. 1978). The fact that severance would improve chances for acquittal is not

sufficient. *United States v. Heath, supra*; *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied* 423 U.S. 1050 (1976).

Applying these standards to the case at bar, we hold that the trial court did not err in refusing to grant Strand's motion for severance. The interrelationship of the evidence, vis-a-vis the charges of submitting a false tax return and fraud in the sale of securities, was extremely clear, and, for the most part, inseparable. Strand's argument that the investigations of the charges were handled separately and that severance was necessarily proper is of no moment, when, as here, evidence of submitting a false tax return was directly related to evidence of fraud in the sale of securities. Furthermore, as urged by the Government, the Court properly instructed the jury on the separate nature of the offenses charged..

[By the Court]

> You are instructed that you must consider each of the two counts by itself. Each offense charged is a separate offense and must be considered by you as a separate offense.
>
> If the essential elements charged as to any count have been established by the evidence to your satisfaction and beyond a reasonable doubt, it is your duty to find the defendant guilty as charged in the particular count of the indictment. On the contrary, if any one or more of the essential elements of the offense charged as to any count has not been established by the evidence to your satisfaction and beyond a reasonable doubt, or if you believe the defendant to be not guilty of such count, or if you have a reasonable doubt thereof, it is your duty to return a verdict of not guilty as to the defendant as to such count.

[R., Supp. Vol. VI at pp. 918-919].

We hold that the trial court did not err in refusing to grant Strand's motion to sever.

III.

Strand contends "[t]he trial court committed error as to Count II of the indictment in instructing the jury in the alternative as to acts sufficient to convict where another district judge had imposed a different burden on the prosecution in refusing to dismiss Count II as duplicitous, and as framed Count II of the indictment was insufficient to allow defendant to know the nature of the charge against him and was duplicitous." [Appellant's brief at p. 39]. Disposition of this contention requires elaboration of specific facts relating thereto.

Several weeks prior to trial, on September 22, 1978, a hearing was held on Strand's motion to dismiss Count II of the indictment. During the course of the hearing Strand argued that Count II was duplicitous in that three sales were set forth in the indictment, that the most fatal defect in the indictment was the failure to allege the instrumentalities (of interstate commerce) which were used and how, and that it was impossible to defend the case "unless I know what . . . [Strand] . . . is charged with doing.".

In response, Government counsel stated that the indictment was sufficient in that it: (1) charged a crime with sufficient clarity so as to allow Strand to prepare a defense and (2) protected Strand against being twice placed in jeopardy for the same offense; that Count II of the indictment set forth one scheme or device in connection with the offer or sale of certain securities; and that the six subparagraphs of Count II setting forth specific events and transactions all portray and describe

different aspects of a complete transaction, and, as such, they all constitute part of one scheme.

In denying the motion to dismiss, the Court stated:

> The Court will rule that the motion is denied. The Government is charged with proving all of those things and it is the sales as contemplated under the statute.
>
> [R., Supp. Vol. I at p. 23]

In so doing the Court ruled, according to Strand, that the Government was obligated to prove each of the offenses conjunctively alleged in Count II.

Strand's case was thereafter assigned to another judge. After all of the trial evidence was presented, but prior to the Court's instructions to the jury, the following colloquy occurred in chambers:

> THE COURT: All right. Make your motion.
>
> MR. LEEDY: [Counsel for Strand] If it please the Court, prior to instructing the jury, we would request that the Court give an instruction that the government be required to prove all of the allegations contained in count two of the indictment. This motion is made on the grounds and for the reason of the earlier ruling of Judge Anderson in this case that the indictment would not be dismissed, because of the representations of the U.S. Attorney that they would prove all of the allegations contained in count two, and that such proof would be necessary before a conviction.
>
> MR. SNARR: [Government Attorney] I would like to respond to that, Your Honor, if I might.
>
> THE COURT: All right.
>
> MR. SNARR: I think what Mr. Leedy has reference to are the six subparagraphs of the count two which spell out the scheme to defraud that the government has alleged. We do allege that each of those six subparagraphs

> are part of the same scheme to defraud, and that they are all interrelated and a necessary part of that scheme. We feel that the Court's suggested instruction coming from Devitt and Blackmar, Section 54.07, covers the point in that it requires that the jury find the defendant to be involved with that particular scheme which we have spelled out in those six subparagraphs, and with that instruction, and entitled, "You must find specific scheme as charged," we believe that that is an appropriate instruction consistent with the law, and also consistent with Judge Anderson's ruling on that point.
>
> THE COURT: Well, if I had made a ruling, I would have reversed myself. If that's what he's ruled, that you have to prove every one of them, because that's not the law. The law is that they must prove one or more. And that's the way I'm going to rule. So the motion will be denied.
>
> [R., Supp. Vol. VI at pp. 844-845].

Pursuant to this ruling, the Court instructed the jury in detail relative to Count II by reading Count II, verbatim and by reading §§ 77q(a) and 77x verbatim, and thereafter further instructing:

> The burden is on the prosecution to prove each of these elements beyond reasonable doubt. The law never imposes on the defendant in a criminal case the burden of introducing any evidence or of calling any witnesses.
>
> [R., Supp. Vol. VI at p. 926]

Strand contends that by reason of the aforesaid pretrial ruling of Judge Anderson the Government was obligated to prove each of the *offenses* conjuntively alleged in Count II, i.e., that he did employ a device, scheme, and artifice to defraud; that he had obtained money and property by means of untrue statements of materials facts and omissions; and that he engaged in transactions and practices in a course of

business which operated as a fraud and deceit upon principals of Epoch Corporation stock. [Appellant's Brief at pp. 39-40]. Thus, Strand contends that the Court was obligated to prove, *conjunctively*, the violations set forth *disjunctively* under § 77q(a) which provides:

> § 77q. Fraudulent interstate transactions
>
> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —
>
> (1) to employ any device, scheme, or artifice to defraud, *or*,
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, *or*
>
> (3) to engage in any transportation, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C.S., § 77q(a). [Emphasis supplied].

We disagree with Strand's construction of the two rulings in question. It is clear that during the course of the pretrial hearing, Strand repeatedly argued that Count II was duplicitous in that the six subparagraphs set forth therein alleged three separate violations. It is equally clear that the Government defended Count II on the basis that it set forth and alleged one scheme or artifice to defraud and that the subparagraphs simply delineated or identified the interrelated events and transactions forming the single scheme or artifice to defraud. It is in this setting that the trial court, in our

view, correctly ruled that because the Government was alleging a single scheme or artifice to defraud, it had to prove each of the events and transactions delineated within the six subparagraphs of Count II. Such a ruling, however, is not in conflict with the trial court's subsequent ruling, prior to submitting instructions to the jury, that under § 77q(a) the Government need only prove one or more of the three subsections set forth therein. Thus, we hold that the rulings were not in conflict. One presiding judge at pretrial ruled on the burden of proof relating to *a particular count*, and thereafter the trial court judge ruled on the proof *necessary to convict under a specific statute*. To be sure, we acknowledge the direct relationship between Count II and § 77q(a). Even so, the rulings are not *pari materia* as alleged by Strand. Thus, they do not give rise to any prejudice or reversible error. This is particularly true, when, as here, the instructions given, when considered in whole, were proper and adequate.

IV.

Whereas Strand attacks the sufficiency of the evidence under Count II vis-a-vis the participation of Bruce Allen Jensen as an officer of Associated Underwriters, he has failed to cause to be transmitted to this Court as part of the record on appeal, a transcript of the trial proceedings. *See United States v. Hubbard*. 603 F.2d 137 (10th Cir. 1979). Thus, we decline to consider any sufficiency of evidence contentions "since we cannot make a meaningful evaluation of the claims of error". *Herron v. Roselle*, 480 F.2d 282, 288 (10th Cir. 1973).

Assuming, without conceding, on the basis of Strand's record on appeal, that Strand's appellate brief constitutes a

challenge to the sufficiency of the evidence, we are bound, in reviewing the sufficiency of the evidence, following a verdict of guilty, to view the evidence in the light most favorable to the Government to determine whether there is sufficient substantial proof, direct and circumstantial, together with reasonable inferences to be drawn therefrom, upon which a defendant might be found guilty beyond a reasonable doubt. *United State v. Gibbons*, 607 F.2d 1320 (10th Cir. 1979). Viewed in this light we are satisfied that the evidence amply supports the conviction.

We have carefully considered Strand's remaining allegations of error. We hold that they are, individually and collectively, without merit.

WE AFFIRM.

No. 79-1155 UNITED STATES OF AMERICA
v.
MICHAEL WILLIAM STRAND

McKAY, Circuit Judge,
concurring in part and dissenting in part:

I concur with the majority's treatment of the issues concerning Count I of the indictment. I believe, however, that Part III of the majority opinion seriously undermines a fundamental tenet of our jurisprudence — that an accused defendant "be informed of the nature and cause of the accusation," U.S. Const. amend. VI, in order that he may prepare and present his defense.

I agree with the majority that Judge Anderson, who presided at the pretrial hearing, imposed on the government the obligation to prove the six alleged events and transactions set out in Count II, but not each of the alternative subparts of § 17(a) of the Securities Act of 1933. However, I find no basis for the majority's position that the trial judge did not reverse Judge Anderson on that more limited issue. I do not find in the trial judge's language, reproduced by the majority at page 14 of its opinion, even the slightest room for doubt about the subject of his ruling.

A comparison of the pretrial hearing discussion with the trial judge's jury instruction makes clear that the majority's characterization is at odds with what in fact occurred. Immediately before his ruling, Judge Anderson engaged in the following colloquy with the government attorney:

> THE COURT: Well, if [the six events and transactions] are all interrelated than you are saying you have to prove them all.
>
> MR. SNARR: I am happy and comfortable with that, Your Honor. I am not sure I am willing to say at this point if I missed one I would not have proved the total scheme

> to the satisfaction of the jury. We think they are all part of the scheme and we had to charge them all and we would be attempting to prove them all in support of the one charge and that's the scheme to defraud.
>
> [R., Vol. I at p. 22]

Judge Anderson then charged the government with "proving all of those things." *Id.* at 23. In contrast, the trial judge instructed the jury that the fraudulent scheme could be shown much more easily:

> While a number of representations are alleged in the indictment, it is not incumbent upon the government to prove each and every one of them, but is incumbent upon the government to prove one or more, or a sufficient number of them to indicate and show to you beyond reasonable doubt that the scheme alleged was actually set up.
>
> [R., Supp. Vol. 6 at p. 932].

I cannot imagine a more sharply defined reversal of legal theories.

The implications of the majority's opinion are especially troublesome. In this case the defendant properly believed that the government was working under one theory, and his defense was based upon that understanding. Only after his entire case was presented were the rules of the game changed. To hold, as the majority does, that the rulings "do not give rise to any prejudice," maj. op. at 16, is to render the mandates of the Fifth and Sixth Amendments meaningless. Read expansively, but not unfairly, this decision permits the government to inform the accused of the "nature and cause of the accusation" after the completion of the trial.

Supreme Court, U. S
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No. 79-2021

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL WILLIAM STRAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial judge properly instructed the jury regarding the proof necessary to establish the existence of a securities fraud scheme.

2. Whether the trial judge erred in treating the issue of materiality under the statute proscribing the filing of a false income tax return as a question of law for the court.

3. Whether the government's inadvertent failure to disclose a statement of the petitioner prior to trial constituted reversible error where the statement was not used at trial.

4. Whether the prosecutor's closing argument was improper.

5. Whether the trial judge erred in failing to dismiss the securities fraud charge for pre-indictment delay.

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2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977) 3

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 23-39) is reported at 617 F. 2d 571.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. An extension of time was granted for the filing of the petition for a writ of certiorari until June 21, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of 26 U.S.C. 7206(1) and 15 U.S.C. 77q(a) are set forth at Pet. 3-4.

STATEMENT

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted for submitting a false income tax return for 1973, in violation of 26 U.S.C. 7206(1) (Count I), and for fraud in the sale of securities, in violation of 15 U.S.C. 77q(a) (Count II). The district court sentenced him to three years' imprisonment on Count I and five years' imprisonment on Count II, with all but six months of the sentence suspended, to be followed by five years' probation (Pet. App. 25). The court of appeals affirmed (Pet. App. 23-39).

The evidence adduced at trial showed that petitioner frequently bought and sold the stock of Epoch Corporation, a security traded in the over-the-counter market. Petitioner effectuated these transactions through his own accounts and through various nominee accounts at different brokerage houses. In this way, petitioner was able to control the purchase and sale prices of the Epoch

Corporation stock and to create the appearance of an active market for its securities. In addition to the stock transactions, petitioner was involved in preparations for two mergers in 1973 for which he received finder's fees in the total amount of $29,000. Petitioner failed to report either the gross receipts from the sales of Epoch stock or the finder's fees on his 1973 tax return (Pet. App. 24).

ARGUMENT

1. Petitioner argues (Pet. 8-11) that the trial judge imposed a lesser burden of proof on the government in demonstrating the securities fraud scheme than that imposed by another judge in a pretrial ruling. This, he contends, deprived him of his right to be informed of the nature of the accusations against him. Prior to trial, petitioner moved to dismiss Count II of the indictment on the ground that it was duplicitous in that it set forth three separate sales and, further, that it was insufficient to reveal the nature of the charge against him (Pet. App. 32). Government counsel responded that the indictment charged a crime with sufficient clarity to allow petitioner to prepare a defense and that the six subparagraphs of Count II were not duplicitous, but represented different aspects of a single scheme to defraud (Pet. App. 32-33). In denying petitioner's motion to dismiss, the district judge hearing the pretrial motion ruled that the government would have to prove all the allegations enumerated within the six subparagraphs of Count II of the indictment in order to prove the scheme to defraud (Pet. App. 33). Petitioner's case was later assigned to another district judge for trial. After all of the trial evidence was presented, but prior to the court's instructions to the jury, the trial judge ruled (Pet. App. 34) that a conviction under 15 U.S.C. 77q(a) required that the actions proved under Count II of the indictment constituted one or more

of three types of activities prohibited by Section 77q(a).[1] This ruling is squarely in accord with this Court's recent decision in *United States* v. *Naftalin*, 441 U.S. 768, 772-774 (1979).

Relying on the opinion of Judge McKay, concurring in part and dissenting in part (Pet. App. 38-39), petitioner contends (Pet. 9) that the trial judge's interpretation of 15 U.S.C. 77q(a) allowed the prosecutor to change his theory of the case with respect to the proof necessary to show the existence of a scheme to defraud purchasers. But the ruling by the trial judge related only to the sufficiency of the scheme alleged to show a violation of 15 U.S.C. 77q(a). In an instruction drawn from Devitt and Blackmar, the court informed the jury that the government was required to prove that petitioner participated in the precise scheme alleged in the indictment (Tr. 928). See 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 54.07 (3d ed. 1977). The trial judge's ruling thus did not alter the requirement imposed at the pretrial hearing that the government prove all the allegations in Count II of the indictment in order to establish the

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[1]Section 77q(a) provides that:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

scheme to defraud. Nor does petitioner contend that the government failed to meet this burden. Thus, as the court of appeals correctly concluded (Pet. App. 36; emphasis in original):

> [T]he rulings were not in conflict. One presiding judge at pretrial ruled on the burden of proof relating to a *particular count*, and thereafter the trial court judge ruled on the proof *necessary to convict under a specific statute*. * * * [The two rulings] do not give rise to any prejudice or reversible error. This is particularly true, when, as here, the instructions given, when considered in whole, were proper and adequate.

Petitioner's contention that the trial judge's ruling deprived him of the opportunity to prepare a defense is without merit. The government proved, in accordance with the pretrial ruling, each and every one of the allegations contained in the six subparagraphs of Count II. Petitioner knew that these were the allegations he must be prepared to meet at trial. (See Proceedings of Sept. 22, 1978, at 33-34.) The specificity of the allegations themselves and the full discovery given petitioner through the prosecutor's "open-file policy" (Proceedings of Sept. 22, 1978, at 18) fully apprised petitioner of the charges against him. No more was required. See *United States* v. *Buckner*, 610 F. 2d 570, 573-574 (9th Cir. 1979), cert. denied, No. 79-1014 (Apr. 14, 1980).

2. Petitioner contends (Pet. 11-12) that the trial judge erred in treating the issue of materiality under Count I of the indictment as a question of law. The court's instruction on materiality was as follows (Tr. 921):

> The question of materiality of the allegedly false statements made in connection with the subscribing of a tax return is a question of law for the Court. The Court instructs you that if you find that a substantial

> amount of gross receipts or other income was omitted from the tax return at issue herein, such omission is of a material matter as contemplated by Section 7206, Subsection 1, of Title 26 of the United States Code.

When a defendant is charged with violating 26 U.S.C. 7206(1), the test of materiality is whether particular items must be reported to permit correct estimation and computation of the tax due. *E.g., United States* v. *Null*, 415 F. 2d 1178, 1181 (4th Cir. 1969).[2] Here, the trial judge's instructions to the jury regarding materiality did no more than state the obvious and unavoidable conclusion that the omission of substantial amounts of revenue affects the computation of tax liability.[3] The

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[2]In contrast, "[t]he test for determining the materiality of [a] false statement [in a case in which the defendant is charged with having violated 18 U.S.C. 1001] is:

> "* * * whether the falsification is calculated to induce action or reliance by an agency of the United States, * * *, does it have a natural tendency to influence or is it capable of influencing agency decision?' "

United States v. *Valdez*, 594 F. 2d 725, 728 (9th Cir. 1979), quoting *United States* v. *East*, 416 F. 2d 351, 353 (9th Cir. 1969). In *Valdez* the court found that the trial judge's failure to submit the issue of materiality to the jury in a prosecution for conspiracy to make false statements in violation of 18 U.S.C. 1001 was harmless beyond a reasonable doubt because "[n]o reasonable jury could have reached any other conclusion." 594 F. 2d at 729. As in *Valdez*, the jury in this case could have reached only one conclusion as to the materiality of the omission of substantial amounts of revenue from Strand's tax return. Thus, the holding in *United States* v. *Valdez*, *supra*, relied upon by the petitioner (Pet. 12), does not conflict with the decision below.

[3]Petitioner asserts (Pet. 12) that the omission of gross receipts was immaterial because the government must show that petitioner actually had gross income from his sales of securities. It is well settled, however, that in a prosecution for filing a false income return under Section 7206(1), the government need not prove the existence

factual issue of whether petitioner had willfully omitted substantial amounts of gross receipts from his tax return was properly submitted to the jury (Pet. App. 26). See, *e.g., United States* v. *Haynes*, 573 F. 2d 236, 240-241 (5th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Null, supra*, 415 F. 2d at 1181. On similar facts, the courts of appeals have uniformly approved instructions of the kind given here. See, *e.g., United States* v. *Taylor*, 574 F. 2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Romanow*, 509 F. 2d 26, 28-29 (1st Cir. 1975).[4]

3. Petitioner contends (Pet. 15-19) that the prosecutor's reference during the trial to a deposition given by petitioner before the Securities and Exchange Commission warrants the granting of a new trial because the deposition should have been produced prior to trial under Rule 16(a)(1)(A), Fed. R. Crim. P. But petitioner has not shown that he was prejudiced by the government's inadvertent non-production of the document in question. Indeed, once the prosecutor became aware of defense counsel's failure to receive a copy of the previously recorded statements of the petitioner, he voluntarily

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of any taxable income and proof of omission of gross receipts of the kind which normally produce taxable income is sufficient. The crime is complete with the willful filing of a return that omits material items necessary to the computation of tax. *United States* v. *DiVarco*, 484 F. 2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974); *United States* v. *Ballard*, 535 F. 2d 400, 404 (8th Cir.), cert. denied, 429 U.S. 918 (1976). See also *United States* v. *Taylor*, 574 F. 2d 232, 235-237 (5th Cir.), cert. denied, 439 U.S. 893 (1978).

[4]*United States* v. *Null, supra*, is not to the contrary. The court simply held that the question whether the omitted revenues were de minimis "was properly submitted to the jury." 415 F. 2d at 1181. Here, too, the court's instructions left to the jury the question whether the amounts involved were substantial.

assented to the sanction provided by Rule 16(d)(2), Fed. R. Crim. P., and made no further reference to the deposition at trial (Tr. 794-795). Moreover, there was evidence that both petitioner and his counsel were aware of the basic content of the deposition (Tr. 794; Proceedings of Sept. 22, 1978, at 12). In these circumstances, the trial court did not abuse its discretion in ruling that the prosecutor's actions were not prejudicial. *United States* v. *Kelly*, 569 F. 2d 928, 939 (5th Cir.), cert. denied, 439 U.S. 829 (1978); *United States* v. *Eisler*, 567 F. 2d 814, 816-817 (8th Cir. 1977). This factual determination was affirmed by the court of appeals (Pet. App. 26, 37) and does not merit further review. *United States* v. *Bowers*, 593 F. 2d 376, 379 (10th Cir.), cert. denied, 444 U.S. 852 (1979).

4. Finally, petitioner argues (Pet. 19-22) that he was deprived of a fair trial because the prosecutor in closing argument drew inferences unsupported by the record concerning the unreported gross receipts attributable to the nominee accounts. Petitioner failed to raise this point prior to the submission of the case to the jury and may not urge it now unless there was "plain error" that warrants reversal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); Rule 52(b), Fed. R. Crim. P. The record does not show that petitioner was prejudiced by the prosecutor's comments. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). Moreover, the testimony received at trial indicated that petitioner used the various nominee accounts to execute securities transactions for his benefit (Tr. 69, 94, 126, 454). Thus, the inferences drawn by the prosecutor in his closing argument were consistent with the testimony given at trial. The trial court did not abuse its discretion in ruling that petitioner was not prejudiced by this portion of the closing argument. *United States* v. *Nolan*, 551 F. 2d 266,

274 (10th Cir.), cert. denied, 434 U.S. 904 (1977); *United States* v. *Polack*, 442 F. 2d 446, 447 (3d Cir.), cert. denied, 403 U.S. 931 (1971).[5]

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[5]Petitioner also argues (Pet. 12-15) that the trial judge erred in not dismissing the securities fraud charge for pre-indictment delay. In order to establish such a claim petitioner must prove that the delay caused substantial prejudice to his rights to a fair trial and that the delay was an intentional device by the prosecutor to gain a tactical advantage. *United States* v. *Marion*, 404 U.S. 307, 324 (1971); *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977).

In his motion filed in the district court, petitioner alleged that he was prejudiced by lost evidence and unavailable witnesses. At the September 22, 1978, hearing on his motion, he asserted that the information concerning the stock fraud counts was in possession of the Securities and Exchange Commission in 1974, and from this he reasoned (Proceedings of Sept. 22, 1978, at 31-32) that the prosecutor had intentionally delayed bringing the stock fraud charges so they could be joined with the income tax charge. Petitioner, however, failed to present any evidence at the pretrial hearing to support his allegations. Indeed, the prosecutor in this case advised the court that he had not been assigned the case until after June 1978, and that it was he who made the decision to join the stock fraud charges with the tax charges (Proceedings of Sept. 22, 1978, at 32). Thus, even if petitioner had established actual prejudice, he failed to meet his further burden of showing that the reasons for the delay were impermissible. *United States* v. *Lovasco, supra*, 431 U.S. at 788-796.

The evidence pertaining to the submission of a false tax return as charged in Count I was directly related to the evidence of fraud in the sale of securities as charged in Count II (Pet. App. 31). The fact that a complex case took several years for full investigation and development does not suggest that the government delayed to secure a tactical advantage. See *United States* v. *MacClain*, 501 F. 2d 1006, 1010 (10th Cir. 1974); see also *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (8th Cir.), cert. denied, 434 U.S. 872 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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